TCEQ Tax Relief for Pollution Control Property Advisory Committee

Recommended Adjustments to the TCEQ Pollution Control Property Tax Exemption Program

On March 6, 2015, the Tax Relief for Pollution Control Property Advisory Committee (the "Advisory Committee") met at the Texas Commission on Environmental Quality (TCEQ) central office in Austin. The Advisory Committee discussed the need for clarifications to the Tax Relief for Pollution Control Property Program ("Prop 2 Program"), specifically requesting that the TCEQ clarify its interpretation of the phrase "meet or exceed rules or regulations" in the Texas Constitution and Section 11.31 of the Texas Tax Code.

Purpose:

It should be noted that this recommendation and clarification is not intended to specify that property used in the situations described herein would automatically receive a positive use determination. This clarification would only ensure that the property would be considered to comply with the threshold requirement that the equipment is used "wholly or partly to meet or exceed" an environmental rule, as required under the Texas Constitution and the Texas Tax Code.

The Advisory Committee passed by a vote of (__ - __) the following recommendations:

Recommendation:

1) The commission should clarify by rule or guidance document that the TCEQ interprets the phrase "wholly or partly to meet or exceed rules or regulations" in the Texas Constitution and Section 11.31 of the Texas Tax Code, to include the following situations:

    a) An environmental rule sets a goal, target, or general standard that the property assists in achieving (e.g., water conservation, pollution prevention, or recycling goals);

    b) An environmental rule has been duly adopted but does not apply to the facility because of the timing of the property's installation (e.g., the regulation or rule is not yet final, is not yet effective, or has a future compliance date) or the extent of pollution control realized as a result of the property's utilization (e.g., limiting potential to emit to remain below regulatory trigger thresholds);

    c) An environmental rule has been formally proposed at the time an application is filed that, if finalized, would constitute an environmental rule that otherwise meets the eligibility criteria of the program, but (to be constitutional) the commission should qualify the positive use determination as being final upon the formal adoption of the final rule, but retroactive to the date the use determination was issued if the rule has retroactive effect (e.g., NSPS rules which often set applicability at the date of proposal, not adoption); and

d) An environmental rule that the property was installed to meet or exceed is subsequently repealed or otherwise impacted by administrative or judicial action such that the rule is no longer in place or no longer applies to a facility.

2) The commission should also clarify by rule or guidance that, with regard to §11.31(k)(16) (due to the U.S. Supreme Court decision in *UARG v. EPA* earlier this year keeping in place the GHG BACT for "anyway sources"), that carbon capture utilization and storage ("***CCUS***") equipment now has an adequate environmental rule in place to provide a basis for eligibility of CCUS equipment for a positive use determination, if other program requirements are met.

Rationale:

Many important environmental rules set general targets or goals that are facilitated by the installation of equipment used in pollution control, but do not specify explicit requirements or methods of compliance. Also, rules can be "exceeded" not only by achieving greater pollution reduction than is required by the rule, but also by proactively complying with or exceeding the requirements of an adopted rule that the facility will have to comply with in the future or would have to comply with but for the installation of the equipment in question (e.g., a company installs air pollution control equipment in order to limit its potential to emit and avoid triggering Title V requirements). Similarly, if the timing of the property's installation or the extent of its use prevents it from being subject to a duly adopted rule, that should also be considered "exceeding" an environmental rule or regulation. Just because such equipment is not specifically "required" to comply with a particular rule, the installation does not fail the statutory and constitutional test because an adopted environmental rule's requirements are exceeded through preemptive action. The remainder of the recommendations are warranted due to the ever-changing environmental regulatory framework where the regulated community makes equipment installation decisions when the compliance target is moving and often coming on too fast to await formal adoption of the rule, or is later changed/invalidated after the installation. These complexities should not undermine eligibility.

Attached is a list of examples which illustrate the need for the suggested clarifications.

Respectfully, on behalf of the TCEQ Tax Relief for Pollution Control Property Advisory Committee,

B. G. Adair, Chairman

ATTACHMENT

Examples Which Illustrate the Need for the Suggested Clarifications

Example 1: Property Used to Meet Stated Statutory and Regulatory Objectives.

An applicant installs equipment that reduces the amount of solid waste that is generated. On one hand, no environmental rules specifically require that the applicant reduce the amount of solid wastes it generates. On the other hand, the Federal Pollution Prevention Act states "The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible…"[1] The act also indicates that "[s]ource reduction [i.e., recycling, greater efficiency] is fundamentally different and more desirable than waste management and pollution control."[2] The Pollution Prevention Act only specifies that pollution should be prevented or reduced at the source. The act does not specify individual pollutants since the act applies to all pollution, nor does it specify a specific method of reducing solid waste.

Nothing in the Tax Code or the TCEQ's rules imposes an obligation to cite to a rule or regulation that specifically requires the use of a particular piece of equipment. Furthermore, neither the Tax Code nor the TCEQ's rules impose an obligation to cite to a rule or regulation that calls for a specific emission or discharge limit. The Tax Code and TCEQ's rules only require that an environmental rule or regulation be met or exceeded.

However, under current TCEQ interpretation, an applicant who reduces the amount of solid waste it produces would not be eligible for a positive use determination, because no rule *requires* the installation of equipment to reduce solid waste or imposes a specific limit on the amount of solid waste produced. Because the Federal Pollution Prevention Act sets a general standard of preventing or reducing pollution, the proposed recommended clarification of interpretation would ensure that an applicant who installs equipment to reduce its total amount of solid waste would be considered to have "met or exceeded an environmental rule" and would therefore, be eligible for a positive use determination.

Example 2: Proactive Pollution Control that Limits or Prevents a Rule's Applicability

An applicant owns and operates several engine-generator sets to supply power to oil field production operations. Emissions from the engines do not exceed the major source threshold for any pollutants and are not subject to Title V permitting requirements. The applicant intends to add additional engine-generators, which would cause the total NOx emission to exceed the major source threshold and would subject the facility to Title V permitting requirements.

However, by installing NOx emission controls, the applicant reduces its potential to emit NOx to such a degree that it's operations will not exceed the major source threshold and is not subject to Title V permitting requirements.

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[1] *See* 42 U.S.C. §133.13101(b).
[2] *Id.* at § 13101(a)(4).

Under current TCEQ interpretation, no rule requires that the applicant install the emission controls, and therefore, the applicant would not be considered to have "met or exceeded" an environmental rule. Under the proposed recommendation, the applicant would be deemed to have exceeded an environmental rule by voluntarily reducing NOx emissions to fit under Title V permitting thresholds and thereby the regulation's applicability..

Example 3: Proactive Pollution Control in Advance of Final Rule Requirements.

In January of 2012, an applicant installs a vapor recovery system at an oil tank to control VOCs during truck loading to comply with EPA's proposed NSPS for oil and gas storage facilities. At the time the equipment was installed the rule was only a proposed rule, but in anticipation of the short timeline for compliance with the proposed rule, the applicant was proactive and installed the equipment before the rule was final.

Before the rule was final, the applicant applied for a use determination with TCEQ. Under current TCEQ interpretation, the applicant was not required to install the equipment *yet*, because the rule was not final, and therefore did not meet or exceed an adopted environmental rule. Under the proposed recommendation, the TCEQ would consider the applicant to have met or exceeded an environmental rule due to its efforts to comply with a proposed rule. If a positive use determination was issued by TCEQ, the use determination would become final upon the formal adoption of the final rule and would be effective retroactively to the date the use determination was issued.

Example 4: A Regulation or Rule That Is Revoked or Vacated by Administrative or Court Action.

Applicant installed GHG pollution control equipment on a "non-anyway" source, based on the EPA's GHG permitting rules, which were finalized on June 3, 2010, and became effective, depending on the source, on January 2, 2011 and July 1, 2011.

The Supreme Court's decision in *UARG* on June 23, 2014, established that the GHG permitting requirements were only applicable to "anyway" sources, and therefore did not apply to "non-anyway" sources.

The applicant installed the equipment before the 2014 Supreme Court decision, but a use determination had not been issued as of the 2014 Supreme Court decision. Under current TCEQ interpretation, there would be no rule or statute that was being met or exceeded by the applicant, since the GHG permitting rule, as applied to "non-anyway" sources was struck down. Under the proposed recommendation, the applicant who installed the GHG pollution control should be considered to have installed the equipment to meet or exceed an environmental rule.

Example 5: Federal Mandates to States That Are Not Source-Specific.

The EPA asserts jurisdiction under the Federal Clean Air Act to regulate carbon dioxide and other greenhouse gasses (GHGs). EPA first regulates GHGs in the context of its major source permitting program as part of its Best Available Control Technology ("BACT") reviews (either conducted by EPA or a delegated state with an approved State Implementation Plan (SIP) to administer the permit program). EPA then proposes New Source Performance Standard

("NSPS") for carbon dioxide emissions at new, modified, reconstructed, and existing power plants. While EPA proposes specific carbon dioxide emission limits and technology standards for new, modified, and reconstructed facilities, it does not propose specific emission limits or technology standards for existing facilities, but instead proposes state carbon dioxide emission budgets that will require significant state-wide reductions of emissions but do not mandate facility-specific emission limits or technology standards. Under the proposed recommendation, an applicant who installs carbon dioxide capture equipment at an existing power plant should be considered to have installed the equipment to meet or exceed an environmental rule. The fact that the EPA has not mandated facility- or source-specific emission limits or technology does not detract from the fact that carbon dioxide is regulated by EPA as a pollutant under the Federal Clean Air Act, is subject to BACT reviews by both EPA and TCEQ and, thus, satisfies the Constitutional and Tax Code environmental rule prerequisite.